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NO. 85-46

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1985

DAVID ALLEN ROEDER,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED[1]

I. DOES DUE PROCESS OF LAW GUARANTEED BY THE FOURTEENTH AMENDMENT IN THE CONTEXT OF A CRIMINAL APPEAL WHERE JUDGMENT IS REVERSED ON ONE GROUND AND THE CASE REMANDED FOR A NEW TRIAL REQUIRE APPELLATE DETERMINATION OF ALL OTHER SUBSTANTIVE, NONMOOTABLE GROUNDS OF ERROR ADVANCED REGARDING EVIDENTIARY CONSIDERATIONS?

II. DOES THE PROHIBITION AGAINST DOUBLE JEOPARDY AS APPLICABLE THROUGH THE FIFTH AND FOURTEENTH AMENDMENTS AND DUE PROCESS OF LAW REQUIRE AN APPELLATE COURT TO FIRST CONSIDER CLAIMS THAT CERTAIN EVIDENCE WAS IMPROPERLY ADMITTED AND THEN DISREGARD EVIDENCE WHICH IT FOUND SHOULD HAVE BEEN EXCLUDED IN MAKING A DETERMINATION OF THE SUFFICIENCY OF THE EVIDENCE TO SUSTAIN A CRIMINAL CONVICTION?

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[1]As discussed at length in this brief, the merits of Petitioner's claims of involuntary confessions and illegally seized evidence are not properly before the Court.

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the State of Texas, Respondent herein, by and through its attorney, the Attorney General of Texas, and in response to Petitioner's Writ of Certiorari files this Brief in Opposition.

OPINION BELOW

The opinion of the Court of Criminal Appeals of Texas reversing the conviction delivered on April 3, 1985, and reported at ____ S.W.2d ____ (Tex. Crim. App. 1985), is attached to the petition as part of the appendix.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court under

the provisions of 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES

Petitioner has fully set out the constitutional provisions and statutes upon which he relies.

STATEMENT OF THE CASE

Petitioner was indicted in Cause No. 275540 in the 182nd District Court of Harris County, Texas, for the offense of capital murder. The indictment alleged that on or about January 23, 1978, Petitioner did:

> unlawfully while in the course of committing and attempting to commit aggravated robbery, intentionally cause the death of William Fitzpatrick hereafter styled the Complainant, by shooting the Complainant with a gun.

and also that on or about that same date Petitioner did:

> unlawfully while in the course of committing and attempting to commit aggravated kidnapping, intentionally caused the death of William Fitzpatrick hereafter styled the Complainant by shooting the Complainant with a gun.

(SF I 7).[2]

Prior to trial, a hearing was held on Petitioner's motions to suppress his oral and written confessions and evidence seized in a search of his apartment (SF I 110 *et seq.*), following which the court denied both motions (SF II 636). Petitioner entered a plea of "not guilty," but was found guilty by a jury which also answered affirmatively the special issues submitted pursuant to Tex. Code Crim. Proc. Ann. art. 37.071(b) (1), (2) (Vernon 1981). Accordingly, the court sentenced Petitioner to death.

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[2] "SF" refers to the statement of facts of Petitioner's trial. The following Roman numeral refers to the volume, and the Arabic number refers to the page.

On direct appeal to the Texas Court of Criminal Appeals, Petitioner raised thirteen grounds of error, nine of which challenged the exclusion of certain venire members as contrary to the teachings of *Adams v. Texas,* 448 U.S. 38 (1980). The remaining grounds contested the trial court's denial of Petitioner's motions to suppress and also asserted that, absent the challenged confessions, the evidence was insufficient to sustain the conviction. The Court of Criminal Appeals reversed and remanded for a new trial, finding merit to Petitioner's contentions regarding the exclusion of venire member Tammy Lynn Wilson. The court refused to consider Petitioner's grounds of error relating to the denial of the motions to suppress "since we already have found reversible error." *See* appendix to petition at 7a. The court also held that because Petitioner "does not maintain that all the evidence, proper and improper, is insufficient to sustain the conviction . . . we must refuse to consider the sufficiency of the evidence . . ." *Id.* Petitioner then filed a motion for leave to file motion for rehearing complaining of the court's pretermission of these claims, *see* appendix at 8a-11a, but the court denied leave to file the motion for rehearing. *See* appendix at 12a.

SUMMARY OF THE ARGUMENT

There are no special and important reasons to review this case. The grounds presented by Petitioner involve only well-settled matters of state appellate review which do not implicate any federal constitutional provisions. Because no federal question is presented, this Court should decline to review Petitioner's claims.

REASONS FOR DENYING THE WRIT

I.

THE QUESTIONS PRESENTED FOR REVIEW ARE UNWORTHY OF THIS COURT'S ATTENTION.

Rule 17 of the Rules of the Supreme Court provides that a review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. Petitioner has advanced

no special or important reason in this case, and none exists.

II.

WHEN A CRIMINAL CONVICTION IS REVERSED ON APPEAL, THERE IS NO FEDERAL CONSTITUTIONAL RIGHT TO APPELLATE REVIEW OF OTHER SUBSTANTIVE, NONMOOTABLE GROUNDS OF ERROR.

Petitioner complains that although the Texas Court of Criminal Appeals reversed his conviction because of a violation of *Adams v. Texas*, 448 U.S. 38 (1980), it refused to review his grounds of error challenging the trial court's denial of his motions to suppress his oral and written confessions and evidence seized in a search of his apartment. He concedes, however, that this issue "has never been considered in connection with the requirements of the Due Process Clause of the Fourteenth Amendment by this Honorable Court or any other court." (Petition at 27). There is, in short, no established constitutional right to the type of review Petitioner seeks. That the type of appellate review requested by Petitioner has occasionally been afforded to other criminal defendants does not establish the *right* to such. Appellate courts, like trial courts, enjoy wide discretion in the disposition of issues before them. Thus, in *Travis v. United States*, 364 U.S. 631 (1961), this Court held that where a conviction was reversed on one ground, it was not necessary to reach the remaining contentions advanced on appeal. That this Court took a somewhat different approach in *Killian v. United States*, 368 U.S. 231 (1961) underscores the leeway permissible in treating different appeals differently and undercuts Petitioner's assertion of unfairness in the Court of Criminal Appeal's pretermission of his confession and search and seizure claims.

Further, the obvious reason Petitioner seeks a determination of these issues is his desire to prevail on his related claim of insufficient evidence and thus avoid a retrial. As discussed in Part III, *infra*, however, Petitioner is not entitled to a determination of the sufficiency of the evidence absent evidence held to be wrongly admitted. Therefore, even should Petitioner be afforded review of these claims, and in fact prevail on the merits, he nonetheless would be subject to retrial. Thus, the

"judicial economy" rationale is not implicated, at least not in the sense that consideration of Petitioner's remaining grounds might bar expenditure of the resources necessary for a second adjudication of Petitioner's guilt or innocence. In fact, establishment of a right to the extended review sought by Petitioner could serve only to severely burden the appellate courts which would be required to undertake that review. For this reason, also, this Court should refuse to exercise its certiorari jurisdiction over this claim.

III.

THE DOUBLE JEOPARDY CLAUSE DOES NOT REQUIRE THAT APPELLATE COURTS REVIEW THE SUFFICIENCY OF THE EVIDENCE TO SUPPORT A CRIMINAL CONVICTION ABSENT IMPROPERLY ADMITTED EVIDENCE.

If, as Respondent believes, there is no requirement that Petitioner's remaining grounds of "trial error" be reviewed, it necessarily follows that he is not entitled to a determination of the sufficiency of the evidence absent any improperly admitted evidence. Even should he prevail on those grounds and succeed in gaining suppression of his confessions and other evidence, however, the Texas appellate court would not be obligated to evaluate the sufficiency of the evidence absent those items.

The Texas rule of *Collins v. State*, 602 S.W.2d 539 (Tex. Crim. App. 1980) of which Petitioner complains was followed by the Fifth Circuit in *Tapp v. Lucas*, 658 F.2d 383 (5th Cir. 1981), *cert. denied*, 456 U.S. 972 (1982). This Court declined review of *Tapp* even though in that case the petitioner's claim was arguably more meritorious than the issue raised herein in that the Mississippi Supreme Court, in reversing the conviction due to improperly admitted evidence, had specifically observed that "[w]ithout the wife's testimony, the record on the first trial of this case would not sustain a conviction." *Tapp v. State*, 347 So.2d 974, 977 (Miss. 1977). The circumstances of the instant case are obviously less compelling.

Finally, Petitioner misses the mark in complaining that a

retrial under such circumstances allows the prosecution to muster additional evidence to support a conviction. The policy reasons supporting retrial in such circumstances have long been recognized by this Court:

> Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction. From the standpoint of a defendant, it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution. In reality, therefore, the practice of retrial serves defendants' rights as well as society's interest.

United States v. Tateo, 377 U.S. 463, 466 (1964).

Because Petitioner's claims do not raise substantial issues of federal constitutional dimension, this Court should decline review.

CONCLUSION

For these reasons, Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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